Tech Knowledge

September 19, 2017

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12 Street, SW
Washington, DC 20554

Re: WC Docket No. 17-108

Dear Ms. Dortch:

On Friday, September 15, 2017, Fred Campbell, Director of Tech Knowledge, met with Jay Schwarz, Wireline Advisor, and Rachael Bender, Wireless and International Advisor, in the office of Chairman Ajit Pai.

Mr. Campbell summarized three points that were presented in Tech Knowledge's comments and reply comments in this proceeding:

I. The Commission should conclude that broadband internet transmissions are not "telecommunications" within the meaning of 47 U.S.C. § 153(50) under *Chevron's* first step. Resolving the issue as a matter of law would have the benefit of foreclosing the application of Title II to broadband internet transmissions absent Congressional action.

Standard canons of statutory construction, the structure and purpose of the Communications Act, and the constitutional and other public interest implications of the *Title II Order's* over-broad interpretation all demonstrate that the term "points" in the definition of "telecommunications" is a term of art that excludes broadband internet transmissions. A thorough application of these analytical tools leaves no room for doubt that interconnection with the traditional public switched ***telephone*** network has always been the *sine qua non* of "telecommunications" as defined in the 1996 Act.

"Points" Is a Term of Art

Absent a contrary indication in the statute, when Congress borrows existing terms of art, the courts give those terms their established meaning in *Chevron's* first step.

The term "points" has been used to refer to the specific locations of the originating and terminating locations of a plain old telephone call since the 1934 Act's inception in 1934. The the 1934 Act's fundamental jurisdictional distinction between intra- and inter-state calls was premised on the public switched telephone network's inherent ability to determine the location of the end "points" of a plain old telephone call. Conversely, precedent involving the Commission's treatment of internet transmissions related to voice-over-internet-protocol

services, universal service, and intercarrier compensation is premised on the ***impossibility*** of identifying the locations of end "points" of internet transmissions.

Structure of the Act

It is a presumption of statutory construction that a term appearing in several places in a statutory text is generally read the same way each time it appears. The Communications Act's definitions of "wire communication," "local access and transport area," "interLATA service," and "interstate communication" all use the term "points" to refer to the originating and terminating points of a transmission; and the definitions of "LATA," "interLATA service," and "interstate transmission" all use the term "points" in relation to identifiable locations (i.e., locations that can be and are specified by users). There is no indication in the statute that the term "points" should be given a different meaning as used in the definition of "telecommunications" than it was given in these other provisions.

For better or worse, there is no doubt that the Communications Act defines various types of communications services using technical terms that have the effect of separating those services into different regulatory "silos." Even after its most comprehensive update in 1996, the Communications Act retained the traditional silos for regulating "telecommunications service" in Title II; "broadcasting," "television service," and "mobile service" in Title III; and "cable service" in Title VI. The Act thus divides communications into different "services" that generally correspond to specific types of transmissions. For example, in broad functional terms, over-the-air "television service," "cable service," "direct broadcast satellite service," and "over-the-top" video distributors (e.g., Netflix) all "stream" video to consumers. Yet "television service," "cable service," and "direct broadcast satellite service" are all subject to different regulatory schemes while Netflix is not currently subject to regulation by the Commission at all. This seemingly arbitrary result might appear unreasonable, but it is the regulatory scheme established by Congress, and no amount of hand-wringing by net neutrality advocates can provide the Commission with authority to change it by reading unambiguous statutory definitions more broadly than Congress intended.

The Title II Order rested its determination that internet transmissions are "telecommunications" on the fact that "[c]onsumers would be quite upset if their Internet communications did not make it to their intended recipients or the website addresses they entered into their browser would take them to unexpected web pages." Of course, the same can be said of ***any*** "mobile service" or "wire communication" transmission, including "cable service." For example, the Act's definition of "cable service" includes "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service," such as video on demand. A Comcast cable subscriber who sends a video-on-demand transmission "specifying" that they want to watch *Beauty and the Beast* would doubtless be upset if the cable operator responded by streaming *Bladerunner*. Under the Commission's reasoning in the *Title II Order*, the fact that the cable subscriber did not receive the movie they specified is enough to turn the subscriber's transmission into "telecommunications" and the "cable service" into a "telecommunications service" — a result that is obviously absurd. If the bare fact that internet transmissions successfully facilitate "two way" communications were enough to define them as "telecommunications" under Title II, the Act's definitional schema would be rendered meaningless: ***All*** facilities-based, "two way" communications transmissions would be subject to common carriage.

The Holdings in* City of Portland*,* Brand X*, and* USTA *Are Inapplicable

The holdings in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (equating the term "telecommunications" with facilities rather than transmissions); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005) (*Brand X*) (holding that the term "offer" in the definition of "telecommunications service" is ambiguous); and *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381 (D.C. Cir. 2017) (*USTA*) (applying *Brand X* to the Commission's Title II decision); are inapplicable to the definition of "telecommunications." According to *Brand X*, "[b]efore a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction." *Brand X* concluded that *City of Portland* was not binding precedent because it did not hold that the Act unambiguously requires the Commission to classify cable modem service as a "telecommunications service." Neither *Brand X* nor *USTA* held that internet transmissions use "telecommunications" or that all "information services" use "telecommunications," let alone that either does so "unambiguously." Neither case addressed the meaning of the term "telecommunications" at all, because the appellants in those cases did not raise the issue. There is thus no binding court precedent that prevents the Commission from concluding that broadband internet transmissions are not "telecommunications."

Commission Precedent Prior to the* Title II Order *Is Inapplicable

The *Computer II* unbundling requirements and the Commission's 1998 *Advanced Services Order* would not be inconsistent with the conclusion that internet transmissions are not "telecommunications."

As the Commission noted in its 2005 *Wireline Broadband Order*, facilities-based wireline carriers were required to unbundle their facilities based on their status as monopolists, not on the Commission's analysis of broadband internet access transmission types; and the "Commission established the *Computer II* regulations pursuant to its ancillary jurisdiction under Title I, and not because it determined that facilities-based wireline broadband Internet access service providers were subject to mandatory Title II common carrier regulation."

The *Advanced Services Order's* decision to apply unbundling obligations to incumbent LECs xDSL offerings was similarly based on competition concerns. When the multipurpose facilities that are used for an information service are unbundled, the ***temporal component*** of the information service and any other services the facilities are capable of providing — i.e., the fact that multi-purpose facilities will receive different regulatory classification and treatment depending on the service they are providing ***at a given time***" — are ***separated*** from the underlying facility. In these circumstances, the Commission has historically treated the offering of the unbundled facility itself as subject to regulation as a "telecommunications service" even when, as a factual matter, no "transmission" of any kind is being offered by the carrier that is required to unbundle the facilities. It is not unreasonable to treat the offering of unbundled facilities that ***could*** be used to provide multiple services, including "telecommunications service," as a "telecommunications service." Otherwise, such facilities could have escaped Title II regulation even if they were ultimately used to transmit "telecommunications" for a fee, and thus, to offer "telecommunications service."

But, as the Commission noted in the Wireline Broadband Order, classifying the offering of unbundled facilities as a "telecommunications service" does not mean that particular facilities

must be unbundled in the first place. Similarly, the possibility that the Commission could require that particular facilities be unbundled does not automatically convert all transmission types that are currently occurring on those facilities or that could occur on those facilities into "telecommunications." The absence or presence of unbundling requirements is simply irrelevant to the question of whether a particular transmission type meets the statutorily required elements of the definition of "telecommunications." Otherwise, requiring facilities unbundling of a "cable system" would automatically convert one-way video transmissions over those facilities into "telecommunications," and thus, would convert "cable service" into "telecommunications service." There is no evidence that Congress intended such an absurd result, as the court confirmed in *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 218–19 (3d Cir. 2007).

Constitutional and Public Interest Implications

The *Title II Order's* decision to regulate broadband internet access service as if it were plain old telephone service ignored the differing policy implications of the fundamental differences in capabilities offered by the internet in comparison to POTS. Unlike the PSTN, which was traditionally limited to offering the capability to have private, real-time voice conversations (recorded voicemail has traditionally been classified as an "information service"), internet transmissions simultaneously offer functionality that is substitutable for the delivery of newspapers through the mail, over-the-air broadcast of radio and television programming, the transmission of cable video programming, and the distribution of books. In the context of the mail, broadcast, cable, and books, mere dissemination — i.e., the "conduit" — is protected from common carrier regulation by the First Amendment, because they are public (or "mass media") communications. Mass media communications conduits are protected from common carriage obligations because "the government is capable of repressing speech 'by silencing certain voices at any of the various points in the speech process,' including dissemination."

For example, Congress ***expressly*** exempted multichannel video programming distributors and broadcasters from common carrier regulation in section 542(c), which exempts "cable service" from "regulation as a common carrier or utility," and section 153(11), which exempts anyone engaged in "radio broadcasting" from being "deemed a common carrier." The Supreme Court addressed this limitation on the Commission's authority in *Midwest Video Corp.*, 440 U.S. 689, 705 (1979), in which the Court held that Congress's "unequivocal" prohibition on common carrier treatment in section 153(11) (and by direct analogy, section 542(c)) "forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast [and cable] systems."

Given that the *Title II Order* relied on *Chevron* deference to interpret "telecommunications" broadly, i.e., it concluded the term "points specified by the user" was ambiguous, the Commission's interpretation was unreasonable under the doctrine of constitutional avoidance, which states that "statutes will be construed to defeat administrative orders that raise substantial constitutional questions."

II. The term "via telecommunications" in the definition of "information service" does not modify the express elements in the Act's definition of "telecommunications."

First, there is no indication that Congress intended to modify the Act's explicit definition of "telecommunications" by using the term "via telecommunications" in the definition of "information service." Second, the Commission concluded in the *Non-Accounting Safeguards*

Remand that the term "via telecommunications" does not have a substantively material effect on the definition of "information service" itself. Specifically, the Commission held that "there is no material difference between the scope of the terms 'telecommunications' and 'information services' under the MFJ and the Act." The Commission noted that the MFJ used the term "***may be conveyed*** via telecommunications" and the Act uses the term "via telecommunications," but concluded that this minor difference in wording did not create a "substantive distinction." The Commission has thus interpreted the term "via telecommunications" as a simple acknowledgment by Congress that, in the dial-up era, the use of "telecommunications" was typically required to access the internet.

III. The *Title II Order's* gatekeeper analysis contracts D.C. Circuit precedent on switching costs and competition.

The *Title II Order's* conclusion that BIAS providers have the ability to act as as "gatekeepers" (a synonym for "bottleneck" power) "regardless of the competition in the local market for broadband Internet access" contradicted the D.C. Circuit's precedent addressing bottleneck power without discussing that precedent; and the D.C. Circuit's opinions in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), and *USTA* contradicted the same D.C. Circuit precedent without attempting to distinguish or overrule it.

In *Verizon v. FCC*, the court held the Commission had demonstrated that BIAS providers have "economic power," because the court "saw no basis for questioning the Commission's conclusion that end users are unlikely to react" to "any given broadband provider's attempt to impose restrictions on edge providers by switching broadband providers." The same court reached the opposite conclusion in *Time Warner Entm't Co., LP v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (*Time Warner II*), and *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009). In *Comcast*, the court concluded that the Commission had acted arbitrarily and capriciously by concluding that a "cable operator serving more than 30% of subscribers can exercise 'bottleneck monopoly power,'" because the Commission had "failed to demonstrate that allowing a cable operator to serve more than 30% of all cable subscribers would threaten to reduce either competition or diversity in programming." The court began its analysis by noting that, whether a cable company can exercise gatekeeper power "depends, as we observed in *Time Warner II*, 'not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the availability of competition,'" because "[i]f an MVPD refuses to offer new programming, customers with access to an alternative MVPD may switch." The court noted that the Commission's evidence regarding switching — which consisted of describing transaction costs that are substantively similar to the evidence the agency offered in the *Title II Order* — was "non-empirical." The court was willing to concede that "transaction costs undoubtedly do deter some cable customers from switching to satellite services," but based on record evidence that almost 50% of all [satellite] customers formerly subscribed to cable, the court concluded that "the Commission's observation that [transaction] cost[s] may deter some customers from switching to [competitors] is ***feeble*** indeed."

Empirical evidence of switching among mobile BIAS providers is even ***stronger*** than the record evidence of switching the court considered to be definitive in the *Comcast* case. According to the Commission's most-recent annual mobile competition report, during the years from 2012 to 2015, on average, 23% to 24% of mobile subscribers switched providers every year. Similarly, a survey conducted by the Commission itself found that "[j]ust over one-third of Internet users changed their service provider in the prior three years," with 13% switching more than once during the three-year period. The same survey also found that, among broadband users who

have a choice of ISPs, nearly two-thirds (63%) "said it would be easy to switch providers, with 33% saying it would be very easy and 30% saying it would be somewhat easy." Like the non-empirical evidence regarding the effect of transaction costs on switching that the Commission presented in the Comcast case, the "costs of switching" relied on by the Commission in the *Open Internet* and *Title II Orders* and by the court in *Verizon* and *USTA* are contradicted by empirical evidence that consumers routinely switch among different BIAS providers.

To the extent the record in the *Open Internet* and Title II *Orders* proceedings lacked this empirical evidence of switching, that evidence was always readily available to the Commission. It appears, however, that the D.C. Circuit panels in the *Verizon* and *USTA* cases were unaware of this evidence. This time, the Commission should expressly consider it and reach the same conclusion as the court in *Comcast*.

Sincerely,

/s/ Fred Campbell /s/

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